UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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E.I. du PONT de NEMOURS AND COMPANY,

Plaintiff,

v.

KOLON INDUSTRIES, INC. and KOLON CORPORATION,

Defendants.

----------x

New York, N.Y.

12 Civ. 8435 (AJN)

May 2, 2013
9:38 a.m.

Before:

HON. ALISON J. NATHAN,

District Judge

APPEARANCES

KOBRE & KIM LLP
Attorneys for Plaintiff
BY: MICHAEL S. KIM
CARRIE A. TENDLER
MARCUS J. GREEN
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PAUL HASTINGS LLP
Attorneys for Defendants
BY: MARK D. POLLACK
DANIEL B. GOLDMAN
BENJAMIN M. CUTCHSHAW
KIMBERLY I. KEPLER
K. TRISHA CHANG
CHRISTOPHER ALLEN
JEFF G. RANDALL

- also present -

Esther Yook, Korean Language Interpreter

(Hearing resumed)

THE CLERK: All rise.

THE COURT: Good morning, everyone. Please be seated.

OK. Who would like to tell me how you want to proceed?

MR. KIM: Yes, your Honor. I think I'm happy to report that counsel have reached a stipulation on much of the paper that we would have had to burden you with, and so there are just a few conceptual issues left about some documents we could not sort of get on the same page on.

THE COURT: OK. If you would, just start -- if you would start by telling me what you agreed to.

MR. KIM: Actually, I will start by sitting down.

In terms of what we have agreed to, I think one of my colleagues will cover that as a list.

THE COURT: Go ahead, Mr. Green. Pull the mic in front of you.

MR. GREEN: K13 is agreed --

THE COURT: So I meant -- I am happy to hear it, but give me the sort of overview.

MR. GREEN: Oh, well, we've agreed on -- we've exchanged a list of exhibits that we would propose be admitted, and we've agreed on the vast majority of them; there remains a few objections. And then we have stipulations of fact that are finalized enough that we are -- that it can obviate the need

for additional testimony.

And there is essentially two areas -- two large areas of disagreement that Mr. Kim was about to address.

THE COURT: All right. So in terms of the documents that you've agreed to, give me a sense of the scope of the documents.

MR. GREEN: There are documents that are contracts between Kolon Industries and financial institutions. There is documents between Kolon Industries and some fashion houses.

THE COURT: Mm-hmm.

MR. GREEN: There are sets of shipping documents that Kolon produced. There are sets of e-mails between Kolon personnel and these fashion houses reflecting their contacts that they've agreed that we'll move in. There are some e-mails reflecting negotiations of licensing agreements with fashion houses. And they have agreed to the demonstrative that reflects the stock ticker symbols, and they have agreed to stipulate that that is accurate.

And then we have some stipulations of very small facts -- the status of Cooper Tire as a customer of Kolon as to a certain date, the status of another company called Akro Polychem, who was a customer as of a certain date, the fact that the disputed exhibit yesterday was produced by Michael Ahn --

THE COURT: Mr. Green, could you pull the mic closer

and enunciate.

MR. GREEN: Just the fact that the disputed Exhibit 130 from yesterday was in fact produced by Michael Ahn from his files; the fact that Kolon USA has not ever had a New York branch office.

And then we went through -- we have stipulations that describe the availability of certain promotional materials as of a certain date and their subsequent unavailability as to a date. And the fact that the websites that are a host of exhibits were actually accessed and exhibits created therefrom on the dates reflected on the documents from the Web address, the URLs indicated on the documents.

THE COURT: All right. And the documents that you have described that you've got stipulations to that come into evidence, those are just du Pont exhibits, or there are exhibits --

MR. GREEN: There are also their exhibits.

THE COURT: So there is agreement on both sides?

MR. GREEN: Correct.

THE COURT: Is that the pile?

MR. GREEN: We don't have the pile all in place as of yet but we will very shortly.

MR. GOLDMAN: And also, your Honor, we will -- I think it will make sense if you would like one binder of all of the admitted exhibits, would that make sense for the Court?

THE COURT: Yeah. You could, as I said yesterday, in terms of the exhibits themselves, for purposes of moving forward in the future, you all are responsible for them. It would be helpful to me when we're done and we have agreement on what's come in, agreement between you and verification from us, if I give you back the binders of all of the potential exhibits and you produce to me a binder or two, whatever it looks like, of everything that has come in, that would be helpful, a copy set.

So, yes. OK.

MR. GREEN: Your Honor, do you have a preference for the form of stipulations?

THE COURT: No. You can put those together in with whatever document you would like.

Why don't you, since it doesn't sound overly extensive, go, as you had started to do, Mr. Green, read into the record what documents you've reached agreement on and then we can turn to the points of disagreement.

MR. GREEN: I will read off the du Pont exhibits that we have reached agreement on, and I'll let Dan read off the exhibits from Kolon that are agreed upon.

Exhibit 7, Exhibit 21, Exhibit 22, Exhibit 32, Exhibit 45, Exhibit 49, Exhibits 55 through 58 and -- I should note that Kolon is persisting in its sort of blanket objection as to the date ranges for relevance -- Exhibit 61, Exhibits 67, 68,

69 and 70.

THE COURT: OK. Is that the end?

MR. GREEN: No. There are only a few more.

THE COURT: Go ahead.

MR. GREEN: Exhibit 107, Exhibits 108 through 118, Exhibit 120, Exhibit 256, and we've agreed to their entire list with the exception of that --

THE COURT: Right. So before -- I am a stickler about the record.

Mr. Goldman, you agree to -- you waive any objections to the admission of the exhibits that Mr. Green just read, with the exception of your standing objection to dates prior to the -- remind me of the date that --

MR. GOLDMAN: With the exception of the dates, we do not have objection.

As Mr. Pollack said, we will give the Court a list with the exhibits which we're specifically objecting to on the date issue.

THE COURT: All right.

MR. GOLDMAN: We should have that to the Court today.

THE COURT: OK. So then without objection, the exhibits that Mr. Green just read and with the noted objection on timing, those exhibits are admitted.

(Plaintiff's Exhibits 7, 21, 22, 32, 45, 49, 55-58, 61, 67-70, 107, 108-118, 120, 256 received in evidence)

THE COURT: Turning to Kolon's list of stipulated-to exhibits.

MR. GOLDMAN: OK, your Honor. It is Exhibit K13 --

THE COURT: You could either just say -- you can cut "Exhibit" and give the list.

MR. GOLDMAN: All right. K13, K14, K40, K41, K42, K60 and K61.

THE COURT: OK. And, Mr. Green, no objection to those exhibits coming in?

MR. GREEN: No objection.

THE COURT: All right.

MR. GOLDMAN: There may be a couple of other exhibits. There are actually K20 to 23, which we have to talk to them about; we did not do that. But if that is also stipulated to, we will notify your Honor.

THE COURT: Well, OK. The previous --

MR. GOLDMAN: Sorry, your Honor. K62, as well, which is our demonstrative, which we'll discuss with du Pont.

THE COURT: I don't have stipulations on those.

The previous ones read by Mr. Goldman that there is stipulation on and no objection are admitted.

You can bring further ones to me, though the time is -- we are winding down. I want to close the record when we are done. I will give you time to sort out the remaining issues. I should have made you come at 7:30, I guess.

(Defendant's Exhibits K13, K14, K40-K42, K60, K61 received in evidence)

MR. GOLDMAN: The other issue, your Honor, is that we have now failed to reach a stipulation on Palmer Holland, so it stands now we are going to be going forward with the short testimony of Ed Antonucci tomorrow at 9:30.

THE COURT: OK.

MS. TENDLER: Your Honor, I know Mr. Green had started to read the stipulation. Just so the record is clear, we will -- there are some language tweaks. There is agreement in concept on a number of fact stipulations. We will be in a position to read those as agreed into the record before the record closes.

THE COURT: All right. Then we'll do that it -- since we are coming in tomorrow for testimony, I'll let you do a final agreement on any remaining documents, exhibits and we could put the stipulations on the record.

MR. KIM: Judge, I do have a suggestion for possibly finishing today, but I did want to point out that this Palmer Holland witness is -- I think he is not a critical witness sufficiently important that we can't just scratch the person off. It is a witness called by Kolon to rebut, I think, some suggestions that are made by the documents that have been entered into evidence.

The point of disagreement is that there are facts

showing that this witness and Palmer Holland participated along with Kolon to try to frustrate enforcement of the judgment. This really just goes to the witness' credibility. And so if the witness, obviously -- if the direct comes in, this comes in as a cross point.

Now, what I would like to do, if possible, since we still have to finalize the precise wording of the factual stipulation that you have heard about, and there might still be disagreements there, is maybe just to try to take an hour out now, or at some point today, to try to see if we can just agree on what the direct and cross of this witness would say. And if that's accepted, then we don't have to have the person here. If we can't agree on what the direct and cross would say, then, unfortunately, we will have to burden your Honor again tomorrow morning.

But since the only reason I want to put in the interference with the collection issue is because it goes to this witness' credibility, I think hopefully if they want to put in the direct, then some cross should come in and maybe we can get the record closed today. That is just my suggestion.

THE COURT: Other than is it Palmer Holland, in light of the other stipulations that you've already reached, no further testimony is necessary for either side?

MR. POLLACK: Judge, there is a translation issue, regrettably, that was brought to my attention this morning that

may require actual testimony.

THE COURT: You have competing translators?

MS. TENDLER: No.

MR. POLLACK: Well, I will speak with counsel since she tells me the answer is no. We are relying on a translation that they provided to us; they are relying on an inaccurate translation that we provided to them, and we're trying to find common ground. As of now we haven't. If we can't, we are going to have to somehow prove what the actual Korean language says.

THE COURT: Well, the only way I could -- I speak some Japanese. Korean, I've got none. Obviously, all I can do is hear from a qualified translator and be informed.

MS. TENDLER: Your Honor, my understanding of the issue, because- I think it is actually a little simpler than competing translations -- Mr. Ahn produced two different documents from his file. One is a Korean language document which, based on a certified translation which we had produced and which I don't think is in dispute, says one thing, and he also produced an English version of that document from his own files. Now, we're obviously taking the position that the certified translation is what it is and that the English document that Mr. Ahn had in his own files is what it is. We are not offering that as a competing certified translation. We told counsel that this morning. So.

MR. POLLACK: The issue is -- first of all, Kolon provided Mr. Ahn with that translation. If we need to get into this, we will have to recall Mr. Ahn to go through these facts, your Honor. But the issue is a seminal issue that is directly relevant to their case because the mistranslation involves the number of offices in New York --

THE COURT: Look, there is nothing in front of me to decide at the moment.

MR. POLLACK: Right.

THE COURT: We are wasting my time, your time.

It sounds like you need some -- this isn't going to be an endless process, folks. I am going to give you an hour. Work out what you work out. If you don't have it worked out, you put on testimony, you put in evidence. That is the way this goes. It doesn't go on forever.

So work it out or present evidence.

MR. KIM: There is one final issue, Judge, before we are made to hopefully get this record closed today.

There is I think some confusion, and we tried to work it out but I think ultimately we need either you to say something or we both need to say something on the record. There are a category of documents that currently have exhibit stickers on them but they probably shouldn't and these are judicial -- what I'll call judicial materials. There are opinions from the Eastern District of Virginia. There are

transcript excerpts of what counsel have said in proceedings here and in the Eastern District of Virginia. And there is also a document request that was served in this case. And those are the materials we're talking about; there is a handful.

Now, what I had hoped would be -- and I think consistent with something your Honor said yesterday was that materials like this, if parties want to cite them as part of their briefing and point your Honor to particular documents like this that are judicial materials, they can do it, and you can decide to disregard it if you think it is not relevant to your decision.

If that understanding is clear, then we were not actually going to offer these types of things in evidence. I don't think these are really evidentiary materials.

I think what --

THE COURT: You are saying these are judicially noticeable, is that --

MR. KIM: Yes.

THE COURT: So is that contested? I mean, you've described a category -- a couple of categories.

MR. KIM: Right.

THE COURT: If you are asking me to make a blanket ruling on whether --

MR. KIM: No, I am not asking you to make a ruling,

your Honor.

THE COURT: OK.

MR. KIM: But I think -- so we were trying to work this out, and I believe that the Paul Hastings' guys also were just genuinely trying to make sure that they don't end up kind of giving away some right that is going to come back to haunt them later.

I think the confusion arises from whether your Honor would wish materials like this to actually be put into the record at this proceeding, or we could just kind of cite these later and we could, you know, obviously in the briefing argue to your Honor that you should disregard this or disregard that, but that the failure to put in items from these judicial proceedings or that what we say are judicially noticeable in these proceedings -- like, you know, the document requests in this case or a judicial opinion from the Eastern District of Virginia -- that that failure to enter into evidence is not going to be some kind of bar to your Honor considering it. I realize that you got dropped in the middle of this and there was a lot of litigation that has gone on beforehand.

So I think if your Honor has a view about it, I think it would help us in our discussion in the next hour. Maybe we can just come to a stipulation about it. If not, since I'm not asking you for a ruling, I am not asking necessarily for a reaction, but that is the issue.

THE COURT: Does anybody want to speak to it?

MR. GOLDMAN: Yes. I think counsel agrees that these materials are not properly admissible as evidence, and so I think it comes down -- I mean, our objection to a lot of this is it's just highly irrelevant and very, you know, prejudicial in a 403 sense to basically relitigate issues that took place in the Eastern District of Virginia. I mean, they want to put in very large opinions and things that were from evidentiary hearings in Virginia, and we have a limited amount of briefing here.

And I'll give you an example. They want to put in a finding after an evidentiary hearing of spoliation on one particular category of documents that Judge Payne found. It was contested. I believe it was appealed. There were days of testimony. There were experts. The significance of it is mind-blowingly complex, particularly for someone like me who is not technical, and we are just going to go on this rabbit chase in our briefing having now to get into this stuff. And it would basically eat up our page limits here because they are sort of lobbying it in at the last minute and saying, oh, by the way, we are not going to put evidence on, we don't have any documents, we have no proof because Judge Payne had a finding in Virginia is basically what their argument is. I just think it is not in this hearing.

MR. KIM: Judge, let me do this because I don't think

it is fair for us to just have these abstract debates in front of you. Let me give you the four exhibits at issue, and then you can take a look at them maybe while we spend our hour to try to see if we can get --

THE COURT: This is the limit of the scope you are talking about?

MR. KIM: Yes.

THE COURT: So you want these four in as part of the record, and you object on relevance grounds?

MR. GOLDMAN: We object on relevance grounds and --

THE COURT: Just to be clear, that is what we talking about? We are not talking about am I giving you carte blanche to open it up to, you know, whatever Judge Payne's file looks like in this case?

MR. KIM: Sorry. I am reminded there are actually five. One is a transcript.

I guess I am trying to move it into evidence. I think, frankly, it would not be fair to opposing counsel if I enter these into evidence and I start making arguments from them. To the extent they have other judicially noticeable materials that they think were above what I have to say, I think they should be allowed to bring it to the Court's attention.

That's why I just don't think it is an evidentiary issue. It is just that we just couldn't get a commitment that

it is not an evidentiary issue. So I am just going to hand them up. Maybe while we hash things out for the next hour, you can see whether you want them.

THE COURT: It is like a whole transcript, or this is a particular finding or what?

MR. GOLDMAN: Could we get copies of those, too, counsel?

MR. KIM: I thought I gave them to you.

MR. GOLDMAN: I don't think so.

MR. KIM: We will give it to you afterwards. Let me just give you a set.

No. For each of these it is really like one line or one paragraph. I will just walk you through it and maybe that will help.

THE COURT: Why don't you highlight.

MR. GOLDMAN: Your Honor, I think I'm having trouble with the sound now, too. I missed what counsel said.

Are they now trying to move these into evidence?

MR. KIM: No.

THE COURT: He is not. That was my interpretation. He is not trying to move these into evidence. I think he wants permission to be able to cite to them in the papers without having moved them as part of the record.

Is that a fair --

MR. KIM: Yes.

THE COURT: All right. And I'm asking him just to highlight specifically what it is that he might want to cite.

MR. KIM: There are five things.

THE COURT: OK.

MR. KIM: So I guess I have your exhibit back.

THE COURT: Let's bracket it for a moment. You can give it to my staff to look at. But it is a couple of memorandum opinions and a transcript?

MR. KIM: Right.

THE COURT: And --

MR. KIM: And it is really like a paragraph from each of these documents.

THE COURT: OK. I would like to see specifically what it is that is in issue.

MR. KIM: Yes.

THE COURT: All right.

MR. KIM: I could walk you through it now or tab it and give it to you and --

THE COURT: Tab it and give it to me.

Well, tab it. Show it to them. Maybe you can agree. And then if you can't I will let you know.

What I'll -- so you've got a few more exhibits that you need to work through and a few more stipulations that you need to work through. And other than that --

MR. KIM: Just this Palmer Holland guy.

THE COURT: And then Palmer Holland, which maybe you could work through and, if not, we will do tomorrow morning. Otherwise, everybody is done with witnesses and that's it? We've now described the scope of the record. OK.

All right. I asked my -- after I got off the bench last night I thought -- I think my clerk communicated the e-mail. I thought it would be useful to have not a full -- I know if I say I wanted a full closing today, you would say not today, Judge, give us time, and then it would be not that useful to me because it would be after now and it would be before the briefing comes in. My request was to think about a very truncated, just while it is still fresh in my mind, limited to a half an hour a side, summation, and then I will let you put your briefing in and then I will bring you back for argument on the briefing.

Everyone prepared to go forward with that?

MR. KIM: Yes.

THE COURT: And I would like to do that today even if we might be bracketing -- well, you will know when I come back whether -- but even if you are bracketing testimony for tomorrow, we are still going to do that today. OK?

All right. Anything else before I step off and get some other work done?

(Pause)

MR. POLLACK: Not from us.

THE COURT: OK. I will plan to be back in an hour. If you need more time than that, that's fine. I think the courtroom is clear until this afternoon.

Right?

THE CLERK: Mm-hmm.

THE COURT: Just give us time to get me and the court reporter. I will assume it will be about an hour, but if you need more than that, let me know.

THE CLERK: All rise.

(Recess)

(Continued on next page)

(In open court)

THE COURT: Please be seated. Okay. Who will I hear from?

MR. KIM: Mostly me, Judge, and I think there are some issues one of my colleagues will speak to.

So I'll just try to play traffic cop on the outstanding issues. I think the first is this issue about these two documents from Mr. Ahn's files, the translation issue. I believe that is resolved. I will let my partner --

MS. TENDLER: Your Honor, that is resolved. The parties agreed to language. It is being typed up so we can read it to the record without scribbles and colors. We expect to be able to do that perhaps as soon as the next 15 minutes.

THE COURT: Okay.

MR. KIM: The second issue was the subject of these what we call judicial documents we have given the court.

THE COURT: Yes.

MR. KIM: What counsel thought to propose was that when we each file simultaneous post-hearing briefs, that if Kolon's counsel believes it is necessary on the same due date as the reply brief, they can make a separate motion to strike any of these documents that they believe is inappropriate.

Then if they choose to do that, then just we be given just one response brief to that motion which they may or may not make.

THE COURT: It sounds like it may be not necessary expenditure of resources. Why don't we talk about it. I assume the discussion is limited to what you have given me, we are not talking about anything beyond that?

MR. KIM: Yes.

THE COURT: So let's start. One is what is marked as Exhibit 245 which is plaintiff's first request for the production of documents in this matter, right?

MR. KIM: Correct.

THE COURT: You want noticed the fact that you made Document Request No. 9?

MR. KIM: Correct.

THE COURT: All documents and communications concerning sales and marketing, marketing, planning, benchmarking, strategic planning and budgeting in relation to the United States, North America in relation to the U.S. businesses.

MR. KIM: Correct, and that no brochures were produced in response.

THE COURT: I don't have that in front of me. I would allow notice of the fact that this was a document request made. Any objection to that, Mr. Goldman?

MR. GOLDMAN: I don't think there is an objection to notice this was, in fact, a document request. We object on relevance basis that whether or not there was a document

request made is not at all relevant to this Court's determination.

Again I have said this many times in this proceeding, if they want to take up discovery issues, they should have made a proper motion to compel and we should have dealt with it and it should have been resolved. If it hadn't been, they could have made the motions. The appropriate motion to somehow documents weren't produced to which they had a request is not appropriate and it is a waste of everybody's time and judicial resources.

MR. KIM: I am not trying to make a belated discovery motion. In the motion papers or post-hearing papers I would have just put in this along with an attorney affidavit or we could work it into a stipulation now, simply saying that brochures were not produced.

From that I am really arguing an inference that is a rebuttal to their argument that Kolon Industries has really nothing to do with New York, never held itself out as being in New York and so forth.

Our Exhibits 74 and 75 that we got from third parties, frankly we didn't move to compel because there is --

THE COURT: Here's the problem as I see it, Mr. Kim. We know how litigation works. Document requests get made. Sometimes they're responded to fully. Sometimes things aren't found, sometimes parties disagree as to whether the terms mean

the same things.

All of that gets funneled through a discovery process and then something is done to either say they've given us everything or they haven't, and to the extent that there is something that they don't have here, they haven't given us here, what the repercussions are.

MR. KIM: They say they produced everything they have. I am not saying they're hiding it. I am just saying they didn't produce it.

THE COURT: You're not saying they're hiding it?

MR. KIM: I don't think they're hiding it. I don't think that is a fair inference for me to draw from the fact they didn't produce it. I don't have evidence they have these things today or that Paul Hastings didn't produce it improperly.

My assumption is that Paul Hastings asked their client, as they told me that they asked their client to produce whatever they had. Their client gave them the things. We got it. It didn't include the brochures. I think it is a fair inference their client didn't have the brochures any more. That can be an inference from it.

I simply want to establish factually this was asked for and Kolon Industries did not produce anything.

THE COURT: I'll take notice of the fact you made this document request in this proceeding.

MR. GOLDMAN: Your Honor, if necessary, which is what I want to avoid, we may have to respond and put this in context and back-and-forth, what was agreed to and produced. We should be doing this in our briefing. We just said he doesn't contest, he doesn't know whether or not we had it. They asked for it. It wasn't produced. If something is not in the custody, possession and control of the company at the time of production, I don't see what the issue is, quite frankly.

THE COURT: I have made my statement.

How you all want to spend what pages I am going to give you, which it is getting smaller as we speak, that is up to you. To the extent that you're relying -- this is going to be a closed record in terms of factual reliance. Anything that I'm going to make a factual finding on is going to be in this record. That at least I can have control over, and then what you do with you your pages is up to you.

You gave me what's marked as 246, which is a 91-page memorandum opinion in the Eastern District of Virginia litigation, opinion by Judge Payne. You didn't identify any particular passage.

MR. KIM: No. It is really not a piece of evidence per se. It is really just the fact it was issued, and the relevant inference here is that from the absence of the documents, the brochures that we're concerned with, one could infer really two things:

One could infer that Kolon, which there has been a judicial finding it engaged in systematic document destruction, did it in this case, or it may just be innocent that Kolon just in the ordinary course didn't keep these things.

I think I am entitled to argue both that the fact there is a judicial opinion that they've engaged in this conduct in this same case makes it more likely that they did it with respect to the brochures.

I am also entitled to argue that Kolon, having received this opinion detailing the consequences of document destruction, the fact that they might have still engaged in it would also be relevant to the credibility of the one industry's business. The actual statements in it are really not relevant to this case. I wanted to be able to argue the fact that spoliation opinion was issued, and there is a fair inference since this is a judicial finding, the same defendant that engaged in this conduct now is saying that these documents were not available for production, that it makes it more likely there is inference of misconduct as opposed to innocent mistake.

I am not sure why this needs to be entered as an exhibit. I can cite to any rulings or precedence without marking any one of them as exhibits. Because there was confusion back-and-forth on counsel, I want to mark it to be safe I am going to cite, there is no statement in it I am going

to cite and say it is -- sorry?

MR. GOLDMAN: Judge, a couple of things. A little background on this. This was an order that was issued by Judge Payne relative to documents that concerned one product out of the hundreds, the many products Kolon Industries made in which there is a finding that Kolon Industries, before the Eastern District of Virginia litigation was filed in 2009, destroyed documents, deleted documents. It was extensively litigated. There was an evidentiary hearing.

These documents, to the extent they don't exist, would all be relevant because they're 2009 and before. They don't relate to the relevant date here and they only relate to one product out of many of Kolon's products.

Second, the idea they could take this ruling and take a tremendous leap and say to this Court, without knowing the facts and being involved in evidentiary hearing, without any motions in this Court for a motion to compel, can make an adverse inference that Kolon has withheld or destroyed documents is really, quite frankly, beyond outrageous. I don't use that term very often in argument before courts, but it is.

It is absolutely outrageous to think they can seek an adverse reuling in this case before they in this case never made a motion to compel, never made a motion for discovery, and here at the last minute they're making this argument, which is an entirely new argument at closing.

THE COURT: I agree with you, Mr. Goldman. I will notice the fact this opinion issued, judicially noticeable fact. I can't stop you from citing an opinion if you think it is persuasive law, but clearly I am not sure of the relevance.

Even to get to a point of relevance, you need there to be indisputable fact from here from which I could notice, and not a disputable fact, but an indisputable fact. So I'll take notice of the fact that this opinion issued.

There's a transcript from this proceeding in front of Judge Koeltl in which you point to a passage by Mr. Dassoff. He was someone representing Kolon.

MR. KIM: Yes, your Honor. We can skip this one.

The reason I had marked it back when we were marking things to be safe was that there is a statement where he says -- this is another person at Paul Hastings who was involved in the prior proceeding -- there are no offices, never have been for Kolon Industries in New York. It has no officers, no employees in New York, but never has. It has never registered to do business. It has no license, blah, blah, blah, blah, and it says it has no contact with New York and that has been true forever.

Obviously, subsequently we learned Kolon Industries actually was registered here for something like 20-something years and apparently had an office here. Nobody knows if that was another one of these pretend offices or actually a real

office.

THE COURT: You want me to take counsel's statement pre, the beginning of this proceeding --

MR. KIM: No.

THE COURT: I was going to make an offer. I will hold you to your previous arguments.

MR. KIM: No. I think the truth here was -- I don't know what the deal was in the 70's and 80's, maybe they had an office. Nobody can know that now.

Most likely, they didn't have an office. This was actually something I had marked because there was an issue of evolving positions, frankly, on both sides because there was confusion whether, in fact, various Kolon entities really had an office here or was just pretending. This is going to be relevant to the frame of argument.

If it becomes relevant, I will cite it. It was in a transcript of a prior proceeding. I don't think it needs to be marked as an exhibit or entered as evidence.

THE COURT: Well, it will not be.

Then there is what is marked as 249, which is also an opinion by Judge Payne, and you have marked a footnote about how the parties defined Kolon Industry entities in that litigation.

MR. KIM: Yes. This actually is more in the vein of citing case law or citing law of the case. I know it is not

exactly the same case.

THE COURT: It is not, it is not law of the case.

MR. KIM: It is collateral estoppel.

THE COURT: You want to make an estoppel argument? That is a different theory.

MR. KIM: It is for our briefing down the road, but the reason I cite this is because if your Honor recalls, there was an argument made to your Honor when we were first here talking about scheduling when we first came here,.

THE COURT: That was only yesterday, wasn't it?

MR. KIM: It seems like so long ago. There was an argument by counsel for Kolon that basically it was clear the judgment debtor, the relevant entity your Honor has to make this agency analysis of for your jurisdictional decision, is clearly just a company called Kolon Industries, Inc. today.

There was an argument made, and I have the transcript here if you are interested in the exact words, that du Pont should have made a motion for substitution and did not and now has to live with the consequences, i.e., that somehow in the Eastern District of Virginia the actual judgment debtor is the new Kolon Industries.

This exact same argument was attempted before Judge Sweet just earlier, the same day, exactly saying the same thing that du Pont failed to make a motion for substitution of parties; and, therefore, the court, in making its

jurisdictional decision, should not be looking at Kolon Corporation because no motion for substitution was made by du Pont.

Well, Judge, I think this, the footnote in Judge Payne's opinion makes it completely plain this is actually a perversion, complete reverse perversion of what, in fact, was Judge Payne's observation in the case he presided over.

He makes clear in the footnote because Kolon never made a motion for substitution of parties, merely sending out some kind of public notice saying now only the new Industries is liable, that is what they did after the restructuring. One of the exhibits we'll show you is that Kolon declared to the world only the new Industries is liable on this judgment essentially.

Judge Payne makes the observation no matter what you announce, under Rule 25 Kolon has to make a motion for substitution, and if it does not, the judgment debtor remains the same defendant who was sued, which is as far as Judge Payne is concerned, Kolon Industries, Inc. Whether it has renamed itself "Corporation" or something else is irrelevant.

I think this is fair rebuttal to I think the argument that has now been attempted before you and Judge Sweet, that you are not to consider Kolon Corporation the judgment debtor because of some type of failure of motion for substitution by du Pont in Virginia and, therefore, the only debtor is the one

they want it to be.

So because there is a fairly large record here and in Virginia, I didn't want to point your Honor to the specific passage and specific observation of Judge Payne. Again this isn't in the nature of evidence. I don't feel it needs to be marked or entered as evidence. I can cite rulings of other judges that preside over related issues and your Honor can consider them however relevant it is to your decision. That is why I was marking this and bringing it to the court's attention. I just couldn't get a commitment from counsel that they would consider this not arguable unless entered into evidence or so forth. That is why I am marking it. It is really a legal argument.

MR. GOLDMAN: Your Honor, quite frankly, I am having a hard time understanding what Judge Payne is saying here. It is complicated and it is in the context of a discovery dispute. I think that this whole issue of Industries and the Corp., new Industries and old Industries, I am not sure it is a huge issue for this hearing. For Kolon's sake, hopefully it won't be a big issue in the future, but I don't really think it has a lot of relevance for this proceeding, this particular footnote.

They've made their arguments on the record, the difference between the new Kolon Corporation and the old Kolon Industries and what the new Kolon Industries means. I don't think they need this in the record.

THE COURT: I don't actually know what this, I don't know what it means. You're not saying as a matter of preclusion I am somehow bound to reach this?

MR. GOLDMAN: No.

THE COURT: I don't know if this is a factual conclusion in here or legal conclusion.

MR. GOLDMAN: I am not arguing that. I am rebutting what you were told, because of du Pont's failure to file a motion for substitution, the only debtor you can consider is this new Industries entity they're pointing to.

THE COURT: To the extent that this is an opinion you want to cite me because you're not saying it is an estoppel issue, I am not bound, there is not a finding here by which Kolon is bound or I'm bound to follow, you think there is something persuasive here to point me to? I don't think I can stop you from doing that. This is not in as an evidentiary matter. You made an argument it comes in as an evidentiary matter.

I don't think I can prevent you from citing this opinion if you think it is persuasive. Again, so we know what we are talking about, it is Footnote 1 of Judge Payne's October 5th, 2012 opinion.

MR. KIM: Footnote 4.

THE COURT: I am sorry. Footnote 3, actually. Footnote 3 on Page 10 is what was tabbed.

MR. KIM: No. It should have been Footnote 4, Page 12.

THE COURT: Maybe that is why I didn't understand it.

MR. KIM: That is why it was extremely confusing.

MR. GOLDMAN: Judge, I was handed a document with a post-it and arrow next to Footnote 3.

MR. KIM: Sorry.

MR. GOLDMAN: That is why I was puzzled.

MR. KIM: It is a clerical mistake on our part. Take a moment to read Footnote 4.

(Pause)

THE COURT: It is more comprehensible to me now.

MR. GOLDMAN: I think my same comments apply.

THE COURT: And my same conclusion.

Now again just so the record is clear, since we have agreed that this is the limit of what we are talking about, I am not admitting this into evidence, but to the extent that du Pont thinks there is some relevant, persuasive legal conclusion here that they want to point me to, obviously I would take a look at that if that's how you want to use your time.

Then the last is a transcript in front of Judge Payne from April 26, 2013. It is several pages of discussion between Judge Payne and Mr. Cannard, who also represented Kolon, about whether a litigation hold should be in place and what the extent of it is. What is it you want me to do with this?

MR. KIM: Nothing, Judge. I think we can move on.

THE COURT: Thank you. All right. What else?

Further agreements between the parties?

MR. GOLDMAN: Your Honor, I believe we're close on Palmer Holland. If du Pont will agree with me, I think it has come down to a very short relevance argument on three exhibits they want to admit with respect to Palmer Holland.

MS. COLE: I have actually narrowed that further for you. I am going to limit our disagreement over the remaining exhibits to just Exhibit 96 with respect to the Palmer Holland issue.

MR. GOLDMAN: So the bottom line then is that we have agreed on stipulated facts. We have agreed to the admission of certain exhibits. The sole dispute is on the admissibility of Exhibit 96?

THE COURT: Let's put the remain stipulated-to exhibits on the record first. If you would, first of all, I don't know that we have your name. I am going to ask you to sit, as with everyone, and pull the mike to you. Otherwise, we can't hear you. Since that is why we're here, it seems important.

MS. COLE: Better, your Honor?

THE COURT: It is.

MS. COLE: There are two exhibits.

THE COURT: Who are you?

MS. COLE: Kimberly Cole. There are two proposed exhibits we have agreed on and we would like to move into evidence now.

THE COURT: Okay.

MS. COLE: The first has been premarked for identification as Exhibit 96 and I guess will come in as Exhibit 96. I have that here. It is stickered and I have copies for the court.

The second would be Exhibit 261. We have premarked that. I believe that, unfortunately, the copies have been left in the witness room, but I can grab them.

THE COURT: As to 96 and 261, without objection?

MR. GOLDMAN: I think there was 97 and 251.

MS. COLE: Sorry, 97 and 261.

MR. GOLDMAN: 261 or 51? I am sorry. It is 97 we don't object to. I am still waiting, 251 or 261?

MS. COLE: I believe it is 261.

MR. GOLDMAN: The newly-marked?

MS. COLE: Newly-marked exhibit.

MR. GOLDMAN: No objection, your Honor.

THE COURT: All right. 97 and 261 are admitted.

(Plaintiff Exhibits 97 and 261 received in evidence)

THE COURT: Any other exhibits to come in? I know we have one in issue.

MR. GREEN: In their case 62 is in without objection.

It is a demonstrative just for the record. .

THE COURT: Is there anything else you want to move, Mr. Goldman?

MR. GOLDMAN: Yes. We move K62, the demonstrative exhibit into evidence.

THE COURT: Without objection?

MR. GREEN: Without objection.

THE COURT: K62 is admitted as a demonstrative.

(Defendant Exhibit K62 received in evidence)

THE COURT: That is it for stipulated-to exhibits?

So then we have got dispute on relevance on one exhibit.

MR. GOLDMAN: Excuse me, your Honor. If we can get counsel from du Pont to tell me what the exhibit number of the disputed exhibit is again?

MS. COLE: 96.

MR. GOLDMAN: We don't object do 96.

THE COURT: All right. Plaintiff's 96 is admitted.

(Plaintiff Exhibit 96 received in evidence)

THE COURT: Then stipulations?

MS. COLE: I have one thing, I beg your Honor's indulgence on the Palmer Holland stipulation. In fairness to opposing counsel, I didn't have a moment to ask you before we came in the courtroom. We would like to add two things to the stipulation. I don't think there are --

THE COURT: I understood we weren't ready on Palmer Holland.

MR. GOLDMAN: Where we stand on written stipulations, we will get all of them to the court in writing today after argument.

THE COURT: That is fine. I will just mark them as a court exhibit and then I'm comfortable putting them in that way, okay?

MS. COLE: Thank your Honor.

THE COURT: All right. So I think that's it other than the stipulations yet to come in, and to the extent you can't work it out, if we have to have testimony, that is it for the record, right, Mr. Kim?

MR. KIM: Yes, your Honor. Just to be clear, the written stipulations we are talking about include stipulations of fact, not just stipulations of admissibility of exhibits.

THE COURT: Yes, I do understand that. Thank you.

MR. GOLDMAN: Your Honor, I am sorry, there is one other issue. We have stipulated with du Pont that we could admit a limited portion of the deposition of Mr. Ahn, a 30 (b)(6) witness for Kolon Industries. We can provide that in writing to you as well after the closing if you like.

THE COURT: How much?

MR. GOLDMAN: It looks like it is a couple of paragraphs from maybe, a couple of paragraphs from three pages.

THE COURT: Okay.

MR. GOLDMAN: It is a limited amount.

THE COURT: All right. Then that's it? Okay.

So we're going to button this up by the end of the day unless we are coming back tomorrow, in which case we'll button it up tomorrow morning.

Are you prepared to make closings?

MR. KIM: Yes, Judge.

THE COURT: All right. So again this is meant to be a true summary while the evidence is fresh in my mind and to allow me to ask initial questions if I have them. I'll give you 30 minutes a side and then, as I said, we'll come to agreement on a briefing schedule and I'll bring you back in for argument.

Mr. Kim.

MR. KIM: Yes, your Honor. One thing you might find a little odd is I do refer to some facts that would have been in the factual stipulation.

THE COURT: That is fine.

MR. KIM: I will refer to them. I know you haven't heard them.

THE COURT: I will ask you to stand because there is a mike there.

MR. KIM: Thank your Honor. I think at the beginning of the case I referred to the task of the court as being to

analyze jurisdictional agency principles, and the courts have articulate this in several different ways, but the most common concept that one sees is that if the affiliate at issue here, Kolon Global, were not in New York, did not have, did not have the contacts with New York that is relevant, with the out of state company over which the court is seeking to exercise jurisdiction, here Kolon Corporation, also known as Kolon Industries, would that company do the same with its own officials.

In other words, I think the way that translates to this case is if Kolon Global were not pretending to have a New York office and were not engaged in the activities they're engaged in with respect to New York, would Kolon Corporation/Kolon Industries, is it more likely than not that Kolon Corporation would essentially do the same thing itself or perhaps cause another Kolon Corporation subsidiary to do the same thing, i.e., pretend to have a New York office and conduct all of the activities around pretending to have a New York office.

I know that there was a comment at the beginning of the case about shifting positions, and this is made in my opinion the briefings that were submitted so far are only partially helpful because the court's task, obviously, in terms of determining jurisdictional agency is first to determine the relationship between the judgment debtor and the company that

we are alleging has direct contacts with New York.

Second, the court also has to look at whether we are talking about actual contacts or a mix of actual contacts and just pretend contacts with New York.

THE COURT: Just focus on the pretend ones --

MR. KIM: Yes.

THE COURT: -- which is the holding-out theory.

MR. KIM: That is ultimately what we concluded.

Some of the reasons you see a lot of shifting around this, for a while we believed there was actually an office in New York because you have to admit it was pretty confusing. In the end I am not sure, but I am almost sure it is just a pretend office.

THE COURT: Under your theory, let's say we weren't dealing also with the agency issue, but just a pretend presence, admittedly no -- if you have an entity that just pretends to be here but isn't, general jurisdiction?

MR. KIM: Yes, I think so.

I think the benefit that the company gets from pretending to be in New York, in a fact pattern that will be similar to this one is not simply a mistaken giving out a letter with a New York number when it really meant a different type of number. It is not an isolated incident that is specific to a particular transaction.

Where an out-of-state company engages in a systematic

campaign, essentially listing itself in the Yellow Pages, put a New York office with a specific measurement in its annual reports, giving out presentations to customers and sales agents and other people with a map of the world with New York ambiguously marked as if it is one of its facilities, I think under those circumstances, under a due process analysis, when it is then made to be a New York defendant in New York courts and with a New York judge trying to assert jurisdiction over it, I would say it is completely fair and consistent with due process to exercise general jurisdiction over a company that has been telling the world for its own benefit it operates in New York on a permanent basis.

THE COURT: What is your best authority for that?

MR. KIM: So the best authority on those facts are all the district court cases that I have cited. The issue has not squarely been addressed in the appellate courts.

THE COURT: Not even a pretend one?

MR. KIM: Not even a pretend appellate court, that's right. I think it is relevant here that for Kolon Global --

THE COURT: But even at the district court cases, what is your best authority for that proposition, that is to say --

MR. KIM: I think it is Atrans is one of the cases I cited to your Honor, and I mean I think in Atrans you have a company similar to Kolon which has a number of affiliate companies which I believe was like 60-something percent owned.

The court didn't know the exact percentages, but it was a range of percentages owned by the same family.

Here we have an affiliate group of companies that are owned by the Lee family. I think the Lee family essentially controls greater than 50 percent of the Kolon empire starting with Kolon Corporation, which is at the top of the entire Kolon Group and that obviously is the relevant judgment debtor.

In that case the court, even though it observes there are some other contacts, I would say it is analogous here, you have some of the factual stipulations that were not read to you, Kolon Industries itself did not just do mere solicitation in the State of New York. Kolon Industries itself did deals with New York customers. There is a dispute over whether physical goods came into New York or the extent of it, but it was not mere solicitation, and that is what the stipulations will show.

In addition, Kolon Global, the company that we're saying has New York contacts, itself was actually registered, is still registered to do business in New York. I Networks predecessor has been registered for many years, and the courts have observed that where a company is actually registered to do business in New York, that is actually continuous and systematic contacts. This is not a case of somebody registered it and forgot and walked away and forgot they had a New York office and it is grossly unfair to assert jurisdiction because

of a piece of paper that was filed years ago.

As your Honor has seen, Kolon Global itself has engaged in a systematic campaign to get the benefit of saying they operated from New York. Kolon Global, as your Honor heard, is not itself just a company that is merely sort of tangentially related to the judgment debtor.

The witness from Kolon Global stated that Kolon Global itself doesn't actually manufacture anything, that one of its lines of business is to buy materials from other Kolon companies and resell it. The figure he gave, of which he argues only a small percentage is relevant to the United States and to New York, to be fair, but the figure overall is in I think over 200 million, $230 million U.S., and one can have a lot of semantic debates about how important is New York in that slice of the pie.

The best evidence of how important New York is is really not all of us in the courtroom are strangers to Kolon debating it, but really to look at how Kolon Global itself was regarding the importance of New York. Your Honor saw Exhibit 229, which is the internal analysis at Kolon Global which is essentially the reseller for $230 million worth of Kolon Group products, and I would argue the relevant subset there is not the products advice just from the new Industries, but really from any Kolon company because after the judgment debtor here is Kolon Corporation, even though it is called Kolon

Corporation, but it was actually the entity which was sued which owns everything, owns all of the Kolon companies that are selling into Kolon Global.

Kolon Global itself said it just maintained a New York presence. It is only a few thousand dollars a month, and yet they're getting tremendous benefit out of it. It is a bridgehead to the Americas market. It allows them to portray themselves as a global services company.

You saw on the map of all these brochures, you have got all of these offices in, mostly in Asia as one would expect from a company that originated in Korea and a little bit out in New York. Nothing in Americas, just one dot in New York. Kolon Global itself clearly regarded what I have ultimately concluded is probably a pretend presence in New York as vital to its business certainly compared to the cost.

So in assessing if Kolon Global were not doing what it was doing, would Kolon Corporation that gets, that is the by far and large the majority shareholder of Kolon Global and benefits tremendously from Kolon Global by having Kolon Global resell all of these $230 million worth of product from other Kolon companies, whether Kolon Corporation, where there is more likely than not they would take the step of pretending to have a New York office.

In answering that question, one need not just speculate about the state of mind of people sitting in Korea,

what they would have to do. You have to look at the history of how we ended up here.

Kolon Industries, the old Kolon Industries, now actually Kolon Corporation, actually was registered to do business here. They started -- we are not clear when they started. The clues we have is the biographies that you saw, that you saw which are the biographies of the head of the entire Kolon Group from -- remember there was a grandfather, the father and the current person in charge of the Kolon Group, that the father of the person in charge and the current chairman both listed on their biography that they started in the New York branch of Kolon Industries.

Of course, one of the other exhibits also showed that the current CEO of Kolon Industries also listed on his bio that he started the New York branch of Kolon Industries. Clearly Kolon Industries, the judgment debtor, Kolon Corporation began in New York and accorded sufficient importance to New York that they actually specifically listed it on their bios of the CEO. You also saw evidence it got taken out after these proceedings started, but you do have the old version available to you.

You saw evidence that Kolon Corporation, then known as Kolon Industries, was actually registered to do business in New York with the New York State Department of Corporations, that it continued on until 1999.

Now, has it ended in '99? Is it fair to infer because

Kolon Industries just lost interest in New York and decided it really wasn't that important any more? I don't think that is fair. I think it is more likely than not that what happened was that Kolon Industries decided it could get the same benefit by just having one of its subsidiaries pretend to have an office in New York. So you saw the progression of the registrations to do business goes up to '99 with Kolon Industries, and then it converts to, you see a Kolon -- sorry -- 2002. I misspoke. It it goes up to 2002. The record we have says '99 to 2002. We know it must have been earlier because the biographies of the CEOs cite the 80's and one cites the 70's as a New York branch of Kolon Industries.

But from 2002 on, you see another filing that says Kolon I Networks is registered to the present day, and then in that record it also shows a predecessor company called Kolon International had it for a certain period of time until it merged into I Networks.

(Continued on next page)

MR. KIM: So you see it's actually a continuous presence in New York with Industries essentially having these newly formed subsidiaries, with I'Networks, eventually Global, being a subsidiary whose function -- one of its functions being to buy product from Industries, and other companies by Industries Corporation, and just resell it, using the either the real or New York office as a bridgehead for servicing, marketing to customers in the Americas, including North America and New York.

So I think in trying to determine is it more likely than not that absent this litigation -- of course, now they want to have nothing do with New York after looking at some of the New York law, but absent this litigation, is it more likely than not that Kolon Corporation would essentially cause one of its other subsidiaries to do the same thing, or would itself do the same thing, i.e., pretend or actually have an office in New York, I think the probabilities are squarely in favor of saying it is more likely than not that they would have done so because they did it in the past and stopped doing it only, coincidentally, with subsidiaries taking over and doing exactly the same thing. And you'll see in those registrations the subsidiaries literally just came and took over the exact same address that was in the registrations.

Now, I think it is also important to note that Kolon Global itself is not the only one pretending to have a New York

office. Exhibit 74 and 75, which come from the files of Kolon Industries' customers -- now, this is Kolon -- you have both one from 2009 and one from 2010. Now, you recall the restructuring happened at the very end of 2009. So one brochure was at least extant at the time before the restructuring and one afterwards. And it is clearly -- these are clearly brochures of Kolon Industries, not Kolon Global, again with multiple maps ambiguously pretending like they have an office in New York.

Now, you will see one of the stipulations is Kolon USA didn't have an office in New York. There is no evidence that any Kolon entity had an office in New York except Kolon Global possibly just pretending to have some.

These two other exhibits show that in addition to benefiting from having Kolon Global, its sales agent, its reseller, pretend to have an office in New York, Kolon Industries, the judgment debtor, directly, in the lines of business it kept, also pretended to have an office in New York.

Now, this is not a case where we're saying, well, just because somebody said they were in New York we should exercise jurisdiction. Kolon Industries itself did have contacts with customers in New York. The factual stipulations will show that there were contacts with various customers in connection with especially the fashion and retail industry, which is very important to Kolon and obviously to New York.

I think I told you in the beginning candidly, you know, if we were here just arguing based on just the direct contacts of Industries to New York, it is not a compelling or overwhelming amount of contacts, especially when we're asking you to exercise general jurisdiction; but I think in combination with these other facts, it is quite compelling that we are not just arguing just because they solicited some people or pretended to have an office in New York a few times we should exercise jurisdiction. This is clearly you are entitled to infer that the reason Kolon Industries both pretends to have an office in New York itself, as shown by 74/75, and basically substituted Kolon I'Networks Global in its place to then pretend to have an office in New York and resell its own products in North America is because it does have relevant business in New York and it does have relevant business in North and South America that benefits from having -- either having or pretending to have a base in New York.

You also heard from Mr. Ahn, who testified that when he was working for Kolon Global, in addition to buying, essentially, and reselling products from other Kolon companies, including Kolon Industries, he was also involved in the marketing of Miocell, which was a product manufactured purely by Kolon Industries. So it wasn't just the buying and reselling of material, it was really also a sales agency, trying to create a sales channel for Kolon Industries, the new

Kolon Industries, to be able to sell. And this is all from, I guess, the New York branch, which, depending on whom you believe, is either an actual office in Koreatown here or just Mr. Ahn himself, the human being.

But clearly it is confusing enough to outsiders. Certainly I've got to say we were confused, and we actually believed for some time there was a New York office, which is why you see a lot of arguments saying they were their direct contacts.

There was a statement that we offered into evidence not for the truth but just to show you how accustomed Kolon officials were in pretending to have a New York office, Exhibit 59, paragraph 18, was a declaration submitted earlier in this case at the very beginning by a Kolon Industries official, Mr. Jung, saying that Kolon Global, Kolon I'Networks has a New York office. He later said that was a mistake, and that part has been stipulated into the record as well.

My position is not, huh, I got you, he said there was a New York office. My position is they are so accustomed to pretending to have a New York office, if in fact there is a New York office he just made a mistake and ended up saying he had a New York office -- that Kolon Global had a New York office because it has been said so many times.

I think, Judge, the essence of our case is that you've got a company, Kolon Global, that is subject to the

jurisdiction of this court by virtue of its registration, by virtue of its interface with customers in New York -- not just merely solicitation but actual service of customers in New York -- and by virtue of its pretending to have a New York office, and that there is a proper jurisdictional agency finding that can be made between Global and its activities and Kolon Corporation, because Global, while it does business on its own account -- I'm not saying it is a puppet or just an alter ego of Corporation, it does do business that is really just the judgment debtor's business. It functions as both the reseller of the judgment debtor's products, such that the judgment debtor benefits directly from Global's marketing prowess and the ability to market using New York as the bridgehead, and, as you saw in the Miocell example, Global functions as a sales channel for the judgment debtor's products.

And so at least the district courts that have examined the issue appear to say that where the company that is subject to the court's jurisdiction is conducting business that if it didn't conduct that business the out-of-state company would do it with its own officials or would cause it to be done, I think that's exactly what we have here. I think what we have here is a judgment debtor -- an out-of-state judgment debtor that was -- that considered New York sufficiently enough, important enough to be here themselves, and, also, when they were

reorganizing to form subsidiaries, newly form subsidiaries and make them do essentially the same thing that they were doing, which is selling their products out of either a real or pretended New York office and you have this conduct continuing past the filing of the turnover application to the present day -- Kolon Global is still selling Kolon Group products. It's still pretending to have a New York office, as far as we can tell. And I think under these circumstances it fits squarely within ultimately the district court case law that holds it is fair to exercise general jurisdiction over a company that is out of state and yet benefits from having one of its affiliates pretend that there is a New York operation.

So I think, you know, in some ways the two points that I had pointed out in the very beginning, the holding oneself out and agency, really just collapse into the same line of analysis, which is --

THE COURT: Do they collapse, or are you trying to put -- make the whole greater than the sum of the parts? That is to say, do you need both?

MR. KIM: I don't think I need both. I mean, I think the 74 and 75 -- let's say we didn't have an agency argument, let's say there were no Kolon Global and all we had was just Industries and whether it had direct contacts with New York. Then one would analyze it as follows:

The factual stipulations show that Industries engaged

in more than mere solicitation. The courts -- the cases on just general contacts with New York basically say mere solicitation is not enough, but if you have solicitation-plus, it can be enough for exercising general jurisdiction. It is a question of quantity, obviously; there is no mathematical rule.

THE COURT: But for it to be sufficient as a constitutional matter for general jurisdiction, you would have to show, wouldn't you, systematic and continuous --

MR. KIM: Yes. And I think that's what the factual stipulations actually show. In other words, it is not mere solicitation, it's actually the servicing -- it's actually servicing of customers that are based in New York regardless of where the physical products actually end up. It's sending their officials into New York to interface with the fashion industry. Some of the most important companies they interface with are John Jacobs in Barbados, which are headquartered here in the fashion industry, and that, in combination with we don't know why their sales brochures from, you know, past 2010 are not available, but certainly the ones from 2009 to 2010 that you see in 74/75 show that they, meaning the judgment debtor, the ultimate parent company, Industries, were telling customers that they do business out of New York. So I think even on those facts there is sufficient basis to exercise general jurisdiction over Industries.

THE COURT: That does sound to me -- I'm new to some

of the New York cases that you've brought to my attention. But as a former civ pro teacher anyway, those sounded like minimum contacts to me. Those sound like the kind of arguments you would make in the context of specific jurisdiction.

So when I hear sort of solicitation-plus, even in and of itself, I would be surprised if it's right to think that the cases support something that is a couple of visits and a little bit of solicitation to be sufficient for general jurisdiction.

MR. KIM: To be frank, I think if it were just the direct contacts that Industries had with New York that is in the factual stipulation, I think it is pretty thin. I think when you combine it with Industries holding itself as operating in New York, I think you get over the hurdle on even just the specific Industries -- I shouldn't say "specific," even on the particular Industries due process analysis to 74 and 75.

Now, you know, I think the reason that I say that all the agency principles I think are really important here is because it would be a mistake to view this in isolation if there is Industries over here and there is Global over there and we are somehow unfairly trying to say, well, because we can't meet the burden on just Industries, we're just going to take this other random affiliate here who does some stuff in New York and kind of slap them together. Actually, I am not the one who put these companies together; Kolon is. Kolon is the one that is using Global -- and it doesn't make anything --

to resell their products, essentially both function as a reseller and a sales agent. And I think it is the presence of a sales agent, even an independent sales agent in New York, that ends up being important in the case law. Because Kolon, the judgment debtor corporation, has as its economic interests all the Kolon subsidiaries that benefit from selling to Global. And you've got the fact that Global itself, despite they're trying to kind of squirm out of saying they have New York contacts, squarely within the Court's jurisdiction.

So I think -- that's why when I say "collapsed" I don't mean -- you know, because I don't want you to see that the Industries' sole contacts are weak, that I want to just mix them altogether hoping you won't notice. I give you more credit than that. When I say "collapsed," I really mean that the analysis of whether in the Kolon Group as -- and their agency principals is separate from Kolon Industries on its own, as if these are two totally separate concepts for you to resolve one at a time I don't think is accurate. Because Global itself essentially took over from Industries the chain of registrations that they have kept for quite some time in New York. And you also see Global itself is a company that really functions as a reseller and sales agent. That's why I think it makes sense to really think of them as really one issue, which is that these are just the various ways in which Kolon Corporation has gotten for itself the benefit of associating

itself with New York first directly and then after 2002 through I'Networks and Global.

THE COURT: Just you are using Kolon Corporation in that sentence interchangeably with Industries, right?

MR. KIM: Correct.

THE COURT: You've switched back and forth in the course of the summation between --

MR. KIM: Yes, depending on the point, like Miocell is actually a product of --

THE COURT: Industries.

MR. KIM: -- the new Kolon Industries, because that is -- and the time period in which it occurred and so forth.

But what I mean when I am talking about Kolon Industries, the judgment debtor, is the same entity that used to be called Kolon Industries, now it is called Kolon Corporation.

THE COURT: Right.

MR. KIM: That's the legal person that owns all of the other Kolon companies that are basically using Kolon Global as its reseller and sales agent.

It would be unfair, I think, and really contrary to logic, that after having separated itself into two as a result of restructuring in the middle of the litigation Kolon were now able to say, well, we're just a holding company, we don't really do anything, so therefore we can't be subject to

anyone's jurisdiction, period, we just own shares of other companies. The fact is that the defendant who was sued was an operating company, named Kolon Industries; the same legal person now is Kolon Corporation and happens to have taken some of the assets and put it into a pocket that it named Kolon Industries, its own subsidiary.

The fact is the Kolon Global that operates here, and that has greatly benefited the rest of the Kolon Group, has always been a subsidiary, a direct subsidiary, of Kolon Corporation, formerly known as Kolon Industries.

THE COURT: All right. Thank you, Mr. Kim.

MR. POLLACK: Your Honor, before I begin, I am handing up to the bench a compilation of a few of the select cases on which we will rely. I know that du Pont provided you with their case law at the commencement of the proceedings. And these are some of the cases that we will be citing in our brief.

Your Honor, I think you asked a very important question to the outcome of these proceedings.

THE COURT: You like my questions, I've noticed.

MR. POLLACK: Let's hope I do better answering them than I was attempting to do the other day.

THE COURT: You don't have --

MR. POLLACK: The question that I am focused on is whether the two strands or the two theories that du Pont began

this hearing with two days ago really collapse onto themselves. And our position, Judge, is that du Pont has very confusingly, and entirely inappropriately, conflated these two theories into a single inquiry, because they can't get to a holding out theory as it relates to Industries itself and they are dependent on the agency argument as it relates to Global, and I want to amplify and emphasize that point throughout my comments today. But it is noteworthy today that notwithstanding the fact that when this proceeding began two days ago, you heard counsel tell you that, in all candor, the evidence as it relates to Industries' direct dealings in business in New York is not all that compelling. Now, at the eleventh hour they have lopped in dozens of documents that they're going to argue in their briefs support jurisdiction based upon Industries' direct contacts.

Now, these were subjects that were extensively briefed before Judge Sweet and, indeed, before Judge Koeltl last year. You were told two days ago that the briefing here -- that briefing is not all that germane to the issues that are actually going to be before the Court. And I suggest to you, Judge, that the reason that these issues are now again being injected is evidence that they recognize that the two theories that they suggested are going to be the primary basis that their case simply don't hold water.

Let me start by addressing those two theories and,

time permitting, I will speak to the new theory, but that will be extensively briefed, I assure you.

So first with respect to whether Industries itself holds itself out to do business in the State of New York. I'll refer to this as the constructive presence theory, because it doesn't assume actual presence.

Now, I think the parties are in agreement as to what the standard is. There has to be continuous and systematic contacts. Indisputably the relevant timeframe for assessing those contacts is the date that the turnover motion was filed in New York, which, as you know, was May of last year.

Now, the Court obviously has accepted evidence that predates May of last year, over our objection. But I think the law is very clear, your Honor, that the only possible relevance of such dated evidence is if it can be connected up and if it can be shown that it involves a continuous course of conduct that continued to and through May of last year. So, for example, you heard even today reference to biographies that go back 40 and 30 years. You heard reference to the fact that Industries may have had an office in New York in the late '90s but indisputably closed no later than 2002. I submit to you that under the law none of that evidence is properly relevant when you are looking at whether Industries today is continuously engaged in business in New York.

So their theory of constructive presence, your Honor,

simply is not supported by the actual evidence. I'm glad that we are here today just a few hours after the close of the record because I am confident that the evidence is well known to your Honor and you can understand when and to what extent counsel is taking liberties with that evidence. The various brochures and Internet screenshots that you saw over the last two days were very clear in their description that they were relating to Global and I'Networks' business network. None of them -- and I will speak to 74 and 75 momentarily, but with the exception of those, Judge, all of those presentations had nothing to do with Industries. Those cannot form the basis of an argument that Industries was holding itself out as being present in New York.

Now, counsel wants you to focus on two exhibits, 74 and 75. And as you know -- first of all, those exhibits were accepted for a very limited purpose, simply to establish that they were produced to du Pont by third parties in the case. And we contend, your Honor, that is it is impermissible to argue anything beyond that limited and accepted purpose. That notwithstanding, the evidence cannot support the arguments that were made here today.

First of all, those presentations date from 2009 and 2010. There obviously is no evidence in this record to support any ongoing representations made by Industries at any relevant timeframe.

Secondly, there is no evidence that when you look at the actual exhibits, your Honor, you will see the references are not to Industries but they are to Kolon USA, or KUSA, as it is depicted on the maps. And so again they are ambiguous, at best, but certainly cannot be construed to represent that Industries is holding itself out to the world as being present in New York.

And that's all they have as it relates to Industries, Judge. At the end of the day their argument will be -- and this is why we spent all this time on these issues this morning. At the end of the day their argument is going to turn not on the evidence that they have but on the evidence that they feel that exists that they don't have. And as your Honor observed earlier, there is no basis in this record before your Honor to permit those sorts of inference. The actual evidence of record does not substantiate this constructive presence theory for Industries.

And we have given you many cases to that effect. You asked about some of the case law. Obviously, this is highly fact-specific and so you are going to find cases that go both ways. We have given you several cases that conclude that mere advertising is not enough to permit jurisdiction under the State of New York law or federal constitutional standards. The Safety Software case out of New York is particularly relevant in our point of view, your Honor, because there, as here, the

plaintiff was asserting a constructive doing business theory on the basis that the defendant allegedly held itself out as being present in New York. And the facts that are summarized in that days -- this is out of the Southern District last year -- were that the plaintiff --

THE COURT: What case are you talking about?

MR. POLLACK: This is the Safety Software case. It's in our binder, Judge, and it is the first section at Tab 3.

You will see, when you have a moment to look at that, that the plaintiff was asserting that the defendant maintained an office in New York with an actual mailing address in New York, directed third parties to contact it at that mailing address, and used one of these virtual office service providers to facilitate the actual delivery of correspondence to it out of New York. Notably, in this case this was presented before there was a contested evidentiary hearing, and the Court considered all of those allegations in the light most favorable to the movant and found that that was not sufficient to make out a prima facie case, even despite the fact that the Court accepted that there was an actual office in New York for 18 months, without any additional evidence of business activity.

So that is one of the cases that we will point your Honor's attention to. The several cases that counsel alluded to in their opening and has provided to your Honor are readily distinguishable, and we will obviously do that with great care

in our briefing. But I should tell you that in the one case that was invoked by counsel, the principal in that case in its advertising material suggested that its principal office was in New York. There is nothing in this record remotely suggesting that Industries was promoting its principal office as being in New York.

Several of their cases likewise occur under the -- are analyzed under the prima facie test and where the Court has to indulge every inference in the movant's favor -- not so here -- and in every one of those cases there was much more than just this constructive presence. In each case the Court found there was actual business taking place in New York as well. So, as I say, we will readily distinguish those for you at the appropriate time.

THE COURT: Is that -- just back to the I think it is Judge Mukasey's decision, the one that you referenced. The point of distinction you are drawing is the difference between holding a principal office out versus something else?

MR. POLLACK: Well, no. In that particular case the materials that were relied upon suggested that the principal location of the company was in New York -- quite different from suggesting that there might be a branch office in New York. And as you know, our position is that there is nothing in this evidence to suggest that Industries was even suggesting as such. That evidence all relates to Global.

THE COURT: Right.

MR. POLLACK: So let me turn to Global now and try to address the point as to why, under the established principles of agency law, none of the evidence that relates to Global is properly imputable either to Corp. or to Industries.

Let me first speak to Corp. quickly and try to clarify our position on that issue.

The relevant jurisdictional period, your Honor, is 2012. Three years earlier this restructuring took place. So as of 2012 Global Corporation indisputably is a holding company, and the law is quite clear that you cannot impute on an agency basis a subsidiary relationship to a parent if the evidence shows that the parent is simply an investment vehicle -- a holding company that invests in the subsidiaries and does not operate through them. And this record is -- there is nothing to the contrary in this record. So, ultimately, this is going to come down to whether the acts of Global may properly be imputed on an agency basis to the operating company, its sister company, Industries.

And the actual evidence, your Honor, leaves no doubt that these two companies have always operated independently of one another. You have heard the evidence, how substantial they are, and their different business focuses.

There is a case that we think is most relevant to the legal question, your Honor, and that is the Six Flags case --

that also is included in our materials -- that, as applied to the analysis here, asks the question would the revenues generated by Global in New York be large enough such that Industries would be forced to enter New York in the absence of Global to make up for the financial losses? I suggest that to ask that question leads to its obvious answer.

How much business is Global actually doing in New York? The evidence is just a few hundred thousand dollars a year. Both Global and Industries have annual business of approaching $4 billion. The question is not whether Global may be deemed to be present in New York or pretend to be present in New York, the question is whether they are actually engaged in enough business in New York such that Industries would feel the business compulsion to be present itself.

THE COURT: What do you do with the fact of Global's registration?

MR. POLLACK: We recognize that fact, Judge. There is case law going both ways. There is the Belle Pointe case in our materials that analyzes exactly that question under the federal due process standard, and says that registration itself alone is not a sufficient basis to confer jurisdiction and it would violate due process to so conclude.

Let me be very candid, Judge, at the end of the day this case is going to come down to whether Global's business in New York can properly be imputed to Industries.

THE COURT: Yes.

MR. POLLACK: We don't -- there is all this up and back as to whether and at what point there actually was a physical office in New York. At the end of the day, Judge, I think that really is beside the point. I think the fair reading of the evidence is that there hasn't been an office for many years, that when Mr. Ahn left in New Jersey they just didn't pay attention to details and didn't terminate the registration and continued to make references.

But even if today Global had an office on Fifth Avenue, with a receptionist and a sign on the doorway, it wouldn't matter because Global's actual presence in New York, or its constructive presence through its advertising materials, only becomes relevant if on an agency theory it can be imputed to Industries. And the only way that can happen, your Honor, under the established law, is if you can conclude that Global's business was for Industries' benefit and it was so substantial that Industries would feel compelled to come into the jurisdiction to take that business over. And the actual business has been shown to be de minimis, and that de minimis business is not for Industries' benefit, it is for Global's benefit.

Now, counsel referred to Miocell. And Miocell, understandably -- I can understand why they like Miocell because Miocell is a product that was manufactured -- that is

manufactured by Industries. But what the actual evidence shows, your Honor, is that when Mr. Ahn was asked to market and sell Miocell, he was being asked to do that on behalf of Global, not on behalf of Industries. Any such business conduct that would have taken place would have benefited Global, not Industries.

Most importantly, Judge, no such business ever took place. Mr. Ahn told you that went by the wayside. There was no actual business generated in New York, or anywhere else. And so, again, harking back to the standard, was the business in New York of such a magnitude that Industries would feel compelled to be here if there wasn't any Miocell business? Nor was there any steel business. The only business was the couple of hundred thousand dollars in annual sales that you heard of for Industries' benefit, not for Global's -- excuse me, excuse me, for Global's benefit, not for Industries'.

So we think that at the end of the day what's happening here is du Pont is conflating its two theories in a way that the law simply does not permit, because the law does not permit your Honor to find agency imputation under an agency theory based simply upon constructive or pretend presence in the absence of actual substantial business activity in New York. And absent that agency relationship, none of the evidence relating to Global's business -- activities in New York becomes relevant when you assess whether Industries, or

Corp., either one, is doing business in New York.

As I said, even if Global were here, it wouldn't alter the analysis.

So to wrap it up, your Honor, we think that du Pont's ever changing theories, even throughout this hearing, lack factual as well as legal support. We do give them credit for their creativity, but no amount of creativity or persistence can mask the facts. Industries is not actually present in New York, and there is no evidence to suggest that Industries in any relevant period of time has been holding itself out as being present in New York.

The evidence as it relates to Global may not be imputed to Industries or to Corp. on a proper application of established agency principles.

As your Honor knows, this case is tremendously important to both parties. The ramifications to our client are potentially enterprise-threatening. We are all grateful that your Honor was so flexible with her calendar, and we understand that your Honor will pay careful attention to the briefing.

We look forward to returning as soon as the briefing is completed. Thank you.

THE COURT: Thank you, counsel.

All right. Let's talk about a schedule. Have you reached agreement?

MS. TENDLER: Your Honor, we have agreed on a

suggestion for process. We differ on the amount of time that the parties should be given to complete that process.

I believe the parties are in agreement that at least it is our view that it makes sense to have a simultaneous exchange of opening briefs followed by a simultaneous exchange of replies.

As I said, we differ on the schedule. We have asked that all briefing be done by May 24th, which is the Friday before Memorial Day weekend. That would allow two weeks from tomorrow for openings, at May 17th, and replies one week later, on May 24th.

We've heard your Honor's suggestions about the likely length that will be given for these submission. The parties have been living with this for a long time. We obviously all already identified the relevant cases, and the facts are sort of well known to the people sitting in this room. We think that the briefing can well be completed before Memorial Day.

THE COURT: All right.

MR. GOLDMAN: Your Honor, may I respond?

THE COURT: Yeah. I thought that was the point.

MR. GOLDMAN: Our position is that we would like to have four weeks to do the opening briefs and then each side have two weeks to do a simultaneous opposition.

THE COURT: OK.

MR. POLLACK: Judge, if I can just amplify a little

bit the basis for that request?

Part of it is personal. I have substantial commitments next week and the following that will really prevent me from paying appropriate attention to the briefing, and I would like that opportunity. As you know, our client is in Korea, and that creates additional time pressures for us. We need to give them ample time to review drafts before they are finalized and submitted.

THE COURT: So you propose two weeks and one week, and you propose four weeks and two weeks?

MR. GOLDMAN: Correct.

THE COURT: I'm going to noodle a bit and let you know, because since you still have some things to work out, I'm going to come back and close out the -- hopefully close out the record today, and then I'll let you know what I want to do.

I have to say on your point of agreement, I think I disagree. I'm inclined -- you can persuade me otherwise -- not to do two simultaneous and simultaneous, which then means I'm reading four briefs, two of which don't talk to each other. I would rather have the movants open and then a response and then a reply, because otherwise I'm left with documents that don't speak to each other. So that's my -- go ahead.

MS. TENDLER: Your Honor, that's fine with us as well, and we still think that could be done within, you know, the three-week timeframe we proposed.

THE COURT: You want a week and a half?

MS. TENDLER: We will work it into the calendar. I don't think that changes what our view is on the timeframe.

THE COURT: And your sense of -- I understand their sense of delay. And your sense of emergency is what?

MS. TENDLER: Well, it's not as much a sense of emergency. I will say I think we -- as we expressed to your Honor when we were first here before you sort of asking you to take this, it is our view, and through no fault, in our view, of the parties, that this has sort of languished long enough.

In addition, you know, we also have some personal commitments in the last week of May that our preference would be to resolve this before that, but --

THE COURT: It won't be resolved before that.

MS. TENDLER: Time to have the briefing complete.

THE COURT: I recognize that I should be here working on Memorial Day weekend and you all should be on the beach. But whatever time of the briefing, I want to bring you back in for argument, I think, and I need to write an opinion. So it won't be resolved --

MS. TENDLER: At least have the briefing closed out.

THE COURT: OK.

MS. TENDLER: We think the issues are sort of discrete, and the parties here, we all know the cases. I just don't think it needs to take six weeks.

THE COURT: I will come to agreement on a final schedule.

But your view is -- and I don't disagree with this. I mean, I don't think I need proposed findings, for example. I think just briefing is sufficient, though presumably I will make factual findings.

OK. All right. I'll let you know the final schedule.

How much time do you need? What do you propose just in terms of when we make everyone come back here?

MR. GOLDMAN: I don't think we need to come back. I think at this point we are just going to suggest written stipulations to the Court and we are finished. So I don't think we have to be here in the courtroom to do that. We can just submit them from our office and file them by ECF and fax them or hand-deliver them to you, however you would like to do that.

THE COURT: So written stipulations are going to come in, which I will mark as a court exhibit. The deposition designation that you indicated a couple of paragraphs are going to be, on consent, admitted.

I would like you to check a final exhibit list -- to produce a final exhibit list and check it with my deputy as to what you all agree, and we will make sure it is consistent with our records, is in and then I will mark that as a court exhibit. And then that will be it unless we have to come back

Monday morning.

MR. GOLDMAN: Then we will also submit to your Honor a binder of all the admitted exhibits.

THE COURT: Yes, a copy set of what's on the agreement list.

MS. TENDLER: I think the only other issue -- item that the parties owe the Court is I believe Kolon is going to submit a list of documents by which they are reserving their relevance objection.

THE COURT: All right. OK. And that will be it.

All right. That's fine. So I don't need to see you again. We will just put out an order with the briefing schedule. It will come out today, shortly. I just want to think a little bit longer and look at my own schedule.

I thank counsel and all support staff for what was excellent argument under unusual circumstances. Thank you.

We are adjourned.

THE CLERK: All rise.

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PLAINTIFF EXHIBITS

Exhibit No.	Received
7, 21, 22, 32, 45, 49, 55-58, 61, ...	295

DEFENDANT EXHIBITS

Exhibit No.	Received
K13, K14, K40-K42, K60, K61	297
K62	325